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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-989

FREDERICK JOSEPH G.,
Petitioner,

v.

THE STATE OF CALIFORNIA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIFTH APPELLATE DISTRICT

BRIEF IN REPLY TO RESPONDENT'S OPPOSITION TO THE WRIT

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INTRODUCTION

This brief is written in reply to the Response to the Petition for Certiorari filed by the Attorney General of California. It's purpose is to point out certain major legal and factual omissions in that document, and to demonstrate how the arguments advanced serve to place in sharper relief the importance of the merits of this case.

I

RESPONDENT CONCEDES, IN EFFECT, THAT THE CALIFORNIA JUVENILE COURT, IN MAJOR FELONY CASES, HAS BECOME NO MORE THAN A SPECIALIZED SYSTEM OF PENAL JUSTICE

Respondent characterizes the effect of the Court's decision in *McKeiver* v. *Pennsylvania* (1971) 403 U.S. 528, as permitting "further experimentation with progressive methods of rehabilitation" (Resp. Br. 28)* but then goes on to concede that under California law, the "concepts of rehabilitation and punishment cannot wholly be separated. . . . [I]t is to his benefit to be confined so that he cannot engage in additional similar acts . . ." (Resp. Br. 36.) Respondent has, of course, done no more than articulate the traditional concepts of incapacitation and deterrance, which are the classic hallmarks of criminal punishment. (*United States* v. *Brown* (1965) 381 U.S. 437, 458; Petn. 16-17.)

Respondent next goes on to argue in tedious detail that the present statutory scheme of trial before referees and judges is such an integral part of the California juvenile court law that it cannot be severed from it, and that juries are incompatible with the scheme. (Resp. Br. pg. 36 ff.) Specifically, he maintains there would be a prohibitive cost were it necessary to have a jury trial before a referee and another before a judge. (Resp. Br. 47.)

In making this laughable argument, respondent

* Page references are to the unprinted edition of respondent's brief in opposition.

rather carefully neglects to note the recent invalidation of the "inseverable" referee system on state constitutional grounds by the California Supreme Court. (*In Re Perrone C.* (1979) 26 Cal.3d 49, ___ Cal.Rptr. ___.) Contested juvenile criminal cases are now tried exclusively before judges of the Superior Court, and it is only a minor administrative task to place such trials in courtrooms equipped with a jury box—which is where they are held in a great many locations already.[5]

In making such an argument, respondent also reveals that the principal motive for his resistance to trial by jury is official concern over cost and administrative inconvenience, not any sincere belief that doing so serves the interests of minors, especially those wrongfully accused of a crime. It can be said that this Court has never allowed the evasion of Constitutional requirements upon the assertion that compliance is inconvenient: were such grounds acceptable, there would be no need for trials at all.

(a) Respondent Reads *McKeiver* As Authorizing Life Imprisonment Without Trial By Jury

Finally, respondent closes his discussion of the jury issue with his discovery of a New Jersey statute which permits a sentence of life imprisonment, without trial by jury, for persons found to have committed homicide during their minority. (Resp. Br. 50-51)[6] In pointing this

[5] In the largest California counties, juvenile courts are sitting in regular criminal court houses; in small ones, a superior court judge usually sets aside certain days each week to hear juvenile matters in his regular courtroom.

[6] California, in effect, permits similar life imprisonment of *any* minor committed to the Youth Authority, with a right to bi-annual judicial review, by jury if desired, on the narrow question of whether the individual poses a physical danger to the public. (Welf. and Inst's. Code § 1800 ff.)

Contrary to respondent's suggestion, a hearing under section 1800 does *not* afford a right to litigate one's guilt of the commitment offense before a jury.

out, respondent has provided exactly the *reductio ad absurdum* needed to illustrate our contention that when a juvenile court orders confinement past the age of majority, it becomes a criminal court for purpose of the Sixth and Fourteenth Amendments: It is ludicrous enough to attempt to justify an initial term of imprisonment in a penal institution to age 23 as being in furtherance of some parental function. New Jersey would carry this to age 50 or even 70.

The Illinois legislature, perhaps more mindful of its constitutional responsibilities, has enacted a new statute to deal with major offenses by juveniles effective January 1, 1980. It authorizes detention in a state correctional institution to age 21 upon conviction for certain crimes, and grants the right to trial by jury to the accused. There is no provision for extension of confinement past age 21. [Ill. Pub Act 81-1104, 37 Ill. Annot. Stat. § 705–12(4)]

When the threshold of adulthood is crossed by a "juvenile" court, to borrow a phrase from Mr. Justice Harlan, it becomes merely a "system[] of specialized penal justice [which] might permit erosion, even evasion, of the limitations placed by the Constitution upon State Criminal proceedings." (*In re Gault* (1967) 387 U.S. 1, 68 [Harlan J., Concurring in the Judgment].)

II

THE CALIFORNIA "SUBSTANTIAL EVIDENCE" TEST, AS APPLIED HERE, IS AN *ANY* EVIDENCE TEST

Respondent maintains that "it is well settled that to render a conviction unconstitutional under the Due Process Clause of the Fourteenth Amendment, the conviction must be 'totally devoid of evidentiary support'. (*Garner* v. *Louisiana* (1961) 368 U.S. 157.)"[7] He then proceeds to the conclusion, citing the opinion of the Court of Appeal (Resp. Br. 17-18), that this Court's opinion in *Jackson* [*v. Virginia* __ U.S. __, 99 S.Ct. 2781,] did not announce a new rule of appellate review for California.

Respondent fails, of course, to recognize that the Court of Appeal applied *Jackson* to this record to reach the astonishing conclusion that affirmance is compelled by an isolated statement by a witness who obviously fabricated most of her testimony, and who was openly declared incredible by the trial judge,[8] because it merely appeared there was no "physical impossibility that it is true or the falsity of the evidence is apparent without resorting to inference or deduction." (Opinion, App. A to petn. at 21.)[9]

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[7] *Garner* was a sit-in case in which a group of Negroes were convicted of disturbance of the peace for sitting quietly at a counter and asking for a glass of iced tea.

[8] "THE COURT: Like a jury, I don't have to explain my judgment. That's it. But I will say that although I didn't believe everything Connie Balderas testified to, I do believe that what occurred in the cemetery did occur . . ." (RT 452.)

[9] Respondent Concludes: "Her [Connie Balderas'] testimony concerning the murder is not inherently improbable and it was never established that there is a physical impossibility that her testimony is true nor is the falsity of her testimony apparent without resorting to inferences or deductions." (Resp. Br. 24.)

What this means is that as long as a single line of incriminatory testimony can be pulled from the record which is consistent with Newtonian physics, a judgment must *automatically* be affirmed. This is indeed an any evidence test, and is identical to pre-*Jackson* practice in California. (Petn. 24-25.)

The California Courts' reading of *Jackson* as being a mere restatement of the "any evidence" standard is in error. Since that incorrect formulation has been accepted by all the courts of California,[10] it is deserving of correction by this Court if for no other reason than to ease the overloaded habeas corpus dockets of the federal courts (cf. Stevens., J., dissenting in *Jackson, supra,* — U.S. —, 99 S.Ct. at 2798.)

a. The Facts: Respondent Illustrates That Convictions Can Rest Upon Irrelevant Evidence Under Present California Practice

By arguing to this Court, as he successfully did below, that petitioner's guilt was corroborated by the presence of a vehicle at an uncle's house which had no connection with the crime, respondent only succeeds in illustrating our contention that there is something dangerously out of order as concerns factfinding in California Juvenile Court proceedings: Irrelevant evidence may be used to obtain convictions from trial courts and affirmances on appeal.

[10] The California Supreme Court has cited the Court of Appeal's opinion in this case with approval in *People* v. *Johnson,* (1980) 26 Cal.3d 557, 576, _Cal.Rptr._. (See Resp. Br. 20.)

Respondent relies on the fact that an apparently inoperative (RT 43) 1958 Chevrolet with no curb feelers was found at the residence of petitioner's uncle a month after the crime. Respondent implies that this circumstance should somehow support an inference of petitioner's guilt.

Respondent neglects to acknowledge that the investigator who located this vehicle admitted it was *not* the vehicle suspected in the crime: the suspect vehicle was lime green. (RT 41.) A curb feeler and a piece of rubber molding with lime green paint on it were found at the scene. (RT 42.) These items were believed to have come from the vehicle involved in the crime. (RT 40.)

The color of the vehicle found at petitioner's uncle's house was *not lime green* (RT 42); moreover, it was inspected for indications that a curb feeler had once been attached to it, and *none were found.* (RT 40.) No evidence was presented that petitioner or any member of his family owned a lime green vehicle, and no evidence was presented that the 1958 Chevrolet was involved in the crime.

In most cases, when a particular fact is advanced as justification for a judgment or verdict, the particular fact is something which is logically consistent with the conclusion. This is because ordinarily, judicial factfinding is a rational process.

CONCLUSION

The facts of this case, and the manner in which California prosecutorial and judicial authorities have dealt with them, proves once again that the framers of our Constitution were wise indeed when they guaranteed those accused of crime a trial before a group of citizens who, being not possessed of the legal mind, retain at least their common sense. Minors facing consequences such as were inflicted on petitioner should not be denied the benefit of that wisdom any longer.

This Court should reaffirm that the Sixth Amendment is far more than a technicality.

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Respectfully submitted

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